IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 474

ROBERT D. ELDER, GREENE CHANDLER FURMAN, *Petitioners*,

v.

CHARLES F. BRANNAN, Secretary of Agriculture,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

MEMORANDUM FOR PETITIONERS IN REBUTTAL.

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SYNOPSIS OF MEMORANDUM.

Citations: Cases cited herein are listed in—

1. Index of veterans' *Brief in Opposition* in No. 473.
2. Index of veterans' *Petition for certiorari* in No. 474.

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STATEMENT.

In No. 473 the Secretary of Agriculture petitions for certiorari and seeks reversal of the judgment of the Court of Appeals. The above named veterans oppose certiorari in No. 473 because the judgment of the Court of Appeals, insofar as it reverses the judgments of the District Court, is correct.

In the instant Case No. 474 the veterans petition for certiorari because they seek to be afforded relief from that portion of the judgment below which was adverse to them and to enlarge their rights thereunder. They seek the writ of certiorari with respect to that portion only of the judgment below which was adverse to them, because that portion of the judgment is incorrect and expressly refuses greater and more substantial rights to which they are entitled.

ARGUMENT.

Rights to greater relief claimed and shown.

In view of the situation disclosed by the record, it is a solemn absurdity for the Secretary to ask this Court to believe that:

> "Petitioners do not claim or show that they are entitled to greater relief than the judgment below affords them. There would seem, therefore, to be no reason for this petition. If the [Secretary's] petition in No. 473 is denied, petitioners will be satisfied; * * *" (Secretary's Mem. 4).

The relief afforded by the judgment of the Court of Appeals is confined to directing conditional declaratory judgments by the District Court "to the effect that on October 27, 1947, both appellants [petitioners] were wrongfully denied reinstatement" (R. 95) and that their rights to preference in *reinstatement* under Section 2 of the Veterans' Preference Act of 1944 were violated "in the reinstatement of nonveterans in October, 1947" while at the same time petitioners were "denied reinstatement" (R. 93-94).

The veterans' petition in No. 474 and the allegations in the record show that petitioners' rights to preference *in retention* under Sections 2 and 12 have been violated by the exclusion of the petitioner veterans from duty in their positions since *June 6, 1947*, while nonveterans have been retained continuously on active duty in such positions since June 6, 1947, in preference to the veterans (R. 50-52, 48);

"that plaintiff [petitioners] is entitled to have the benefit of all compensation, benefits, and privileges that would flow from such continuity of service upon active duty. That since the defendant [respondent] has been notified of the pendency of this suit seeking an injunction against him [June 5, 1947], the defendant henceforth acts at his peril and subject to the power of the Court to restore the status [precisely invoking the rule in *Jones* v. *Securities & Exchange Commission,* 298 U. S. 1, 17] . . . That plaintiff is entitled to all annual and sick leave, and to all within grade promotions, all within grade increases of salary, all retirement rights, and all benefits, privileges and emoluments that would normally accrue to plaintiff's benefit during the period subsequent to his wrongful and illegal separation from active duty at the close of business June 6, 1947, to and until plaintiff's restoration to such active duty" (R. 22-23, from Amended Complaint filed June 24, 1947).

The judgment of the Court of Appeals falls far short of affording the substantial relief of retention in continuous employment since June 6, 1947, to which petitioners show they are entitled (R. 22, 50-52). In fact, the Court of Appeals expressly refused such relief and held that the nonveteran nonpreference Attorneys, Grade P-3, retained since June 6, 1947, shall be given the preference in retention over the petitioner veterans (R. 91-92). The veterans petitioned the Court of Appeals for modification of this portion of the judgment which was adverse to them and to be afforded the greater and more substantial relief—both in kind and quantum—to which their allegations show they are entitled (R. 50-52, 22). Their petition below, together with the petition for rehearing of the Secretary, was denied by the Court of Appeals (R. 100).

The veterans' petition for certiorari here in No. 474 seeks the same greater and more substantial relief. In the absence of such petition for certiorari the petitioner veterans could neither be afforded relief from that portion of the judgment below which was adverse to them, *Le Tulle* v.

Scofield, 308 U. S. 415, 421, nor could they attack the decree below with a view to enlarging their own rights thereunder or of lessening the rights of their adversary. *Morley Const. Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 190-191.

The difference between the substantial *kind*, as well as *quantum*, of the relief claimed and alleged and the relatively ephemeral kind of relief afforded by the judgment below, is only too apparent. Let us suppose that each of these petitions in No. 473 and No. 474 has been denied by this Court. The mandate then goes down from the Court of Appeals to the District Court where, "if the record remains as it is," (R. 95) judgments declaring each petitioner entitled to reinstatement as of October 27, 1947, would presumably be entered and petitioners, after four years of exclusion from the Secretary's employment, go back to work for him. But the Secretary has already frankly disclosed his construction of the judgment of the Court of Appeals herein: he holds that "the court applied the standards of the Civil Service Commission's *reduction-in-force* regulations under Section 12 as the measure of veterans' reemployment rights" (p. 6, Secretary's Petition in No. 473). Pressure is notoriously urgent upon non-defense agencies to cut expenses and payrolls. This will naturally find expression in reductions in force by reason of lack of funds. Within a month after their return petitioners may well find themselves again excluded from duty in like manner as they were since June 6, 1947. Perhaps unexpected funds may again become available and the Secretary may thereby be enabled to make appointments to positions of Attorney, Grade P-3, as before (Cf. R. 71). But it is hardly to be expected that other than nonveterans of classified civil service status would be appointed to these positions, consistent with the Secretary's unmodified construction aforesaid (Cf. R. 72). As matters stand, the right of such veterans to preference in *retention* has already been negatived by the judgment below, which would be the law in that important respect. These petitioners would be restricted to

the relatively unsubstantial right to preference in *reinstatement* established by the judgment below, alone available to them. They would have the privilege, of course, to contest the Secretary's "construction" thereof through the Federal courts to the present point—after four more years of intervening amenities. The need of these veterans and thousands of other veterans for the determination at this time, by this Honorable Court, of the greater and genuinely substantial right to preference in *retention*, is therefore critical.

The constricted limitations of the judgment below are apparent. But it would seem that, insofar as it reverses the judgments of the District Court, the judgment of the Court of Appeals rests upon a sound and tenable basis. This basis is analyzed and discussed in the veterans' *Brief for the Respondents in Opposition* in No. 473. This same Brief in No. 473 is especially cogent in support of the veterans' fundamental position in No. 474 with respect to their right to preference in *retention* as of June 6, 1947, and in support of their instant petition in No. 474. We therefore request of the Court consideration of the aforesaid Brief in No. 473 as though it were also filed as part and parcel of the petition in No. 474.

The "Ruling" of the Commission was an unauthorized nullity.

On behalf of the Secretary it is argued (Mem. 5-6):

> "The statute provides only that preference employees shall be retained in preference to 'competing employees'. It is certainly not unreasonable for the Commission to rule that men with classified civil service status are not competitors of temporary employees such as petitioners."

If the Commission's "ruling" had only been with respect to the rights of "men", in the sense of employees without veterans' preference in retention, there would be

no question for this Court to determine herein. The first clause of Section 12 of the Veterans' Preference Act of 1944 provides:

> "SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: * * *" (58 Stat. 390; 5 U. S. C. §861)

The Commission read the above first clause. It was then stricken with selective blindness. At any rate, it looked no further. In its reduction-in-force regulations it led off and followed through by giving paramount overall effect to the first factor of the general terms of the first clause—"*tenure of employment*"—by setting up retention groups A, B, and C, "*according to tenure of employment*". The regulation in question provides:

> "§20.3 *Retention preference; classification.* For the purpose of determining retention preference in reductions in force, employees shall be classified according to tenure of employment in competitive retention groups and subgroups, as follows: * * *" (12 F. R. (2850)

The regulation thus gave paramount overall effect to that first term of the first clause with respect to the rights of *all* Federal employees—including the proviso-preferred class of veterans. But Congress did not stop enacting where the Commission stopped reading. The Congress went on to enact the significant part of the section:

> "* * * *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees * * *"

This is a *proviso*, which counsel for the Secretary conveniently overlook. Under the settled general rule estab-

lished by this Court the Civil Service Commission is without authority to interpret this proviso other than as a special withdrawal and exception of the class of veterans' preference employees whose efficiency ratings are "good" or better from the operation and operative effect of the general terms of the first clause (*period*). *McDonald* v. *United States*, 279 U. S. 20-21; *Cox* v. *Hart*, 260 U. S. 427, 435; *United States* v. *Morrow*, 266 U. S. 531, 534-535; *White* v. *United States*, 191 U. S. 545, 551; *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 242-246; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 181; *Minis* v. *United States*, 15 Pet. 423, 445; Cf. especially the application of the settled rule to the factor of length of service which was alone in issue between a nonveteran employee and veterans of the same classified tenure of employment, in *Hilton* v. *Sullivan*, 334 U. S. 323, 335.

In making the overall A, B, C "ruling" attacked by petitioners herein, the Commission granted superior subgroup A-2 retention preference to nonveteran nonpreference employees with classified civil service tenure of employment. The Commission made this ruling frankly "according to tenure of employment". *It thus gave effect to tenure of employment, the first of the four general terms of the first clause* of Section 12.

At the same time the Commission assigned inferior subgroup B-1 retention rights to veterans preference employees whose efficiency ratings are "good" or better, and who are credited with tenure of employment limited to the duration of the war and six months thereafter. The Commission frankly made this ruling "according to tenure of employment". *It thus gave effect to tenure of employment, the first of the four general terms of the first clause* of Section 12.

But Congress, by the above proviso, effected a special withdrawal and exception of the class of veterans' preference employees whose efficiency ratings are "good" or better from the operation and operative effect of the general

terms of the first clause (*period*). Under the settled rule this withdrawal is inclusive of the term "*tenure of employment*" as well as of the term "*length of service*". Cases above cited. Cf. *Hilton* v. *Sullivan, supra.*

Petitioners are admittedly members of the proviso-excepted and preferred class of veterans to whom the settled rule is applicable (R. 39, 50, 48). The regulation of the Commission which thus gave effect to the term of tenure of employment violated the proviso and did not carry into effect the will of Congress as expressed in the statute. As stated by this Court:

> "The power of an administrative officer or board to administer a federal statute and prescribe rules and regulations to that end is not the power to make laws—for no such power can be delegated—but to carry into effect the will of Congress as expressed in the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 143.

The regulations of the Civil Service Commission thereby assumed the legislative power of altering, amending, and modifying this Act of Congress by subtracting and eliminating the settled legal function of the applicable proviso which also contains an absolute command of the Congress. Administrative rulings cannot add to, or subtract from, the terms of an Act of Congress. *United States* v. *Standard Brewery Co.*, 251 U. S. 210, 217-220; *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, 508.

Section 2, in expressing and embodying the general policy and purpose of the Act of 1944, commands that preference in retention, in reinstatement, in appointment, etc., shall be given to veterans in civilian positions in the unclassified civil service as well as in the classified civil service. This plain command in itself eliminates any apocryphal "construction" carried over from the notion that the veterans' preference in retention under the proviso of §4

of the Act of August 23, 1912, applied only to the classified civil service, or that it applied only to veterans of classified civil service *status* or tenure of employment. See pp. 9-12 of petition in No. 474. See, in particular, the veterans' *Brief in Opposition* in No. 473. Decisions referred to herein are listed in the Index of the Petition in No. 474 and of said Brief in No. 473.

It is there shown that Section 2 grants and prescribes preference in retention as an absolute grant to four primary classes of veterans. In Section 2 this grant is absolute—in no respect conditioned upon tenure of employment, length of service, or efficiency ratings.

In the second proviso of Section 12, *supra*, Congress further prescribes a single condition which expressly limits, to a special sub-class defined as veterans' "preference employees whose efficiency ratings are 'good' or better," the absolute preference in retention previously granted to the four primary classes of veterans established in Section 2. This minimum of "good" efficiency ratings is the only condition prescribed by Congress with respect to the otherwise absolute preference in retention; and the condition is significantly prescribed as a part of the *proviso* which withdraws and excepts this preferred sub-class of veterans' preference employees from the operation and operative effect of the general terms of the first clause relating to tenue of employment as well as length of service.

As pointed out in another connection by this Court in *Hilton* v. *Sullivan*, *supra*, p. 335, the general term "military preference" in the first clause has a distinctly recognizable function "as between veteran and veteran" in the four successive grades of military preference provided in Section 2. The general term "military preference" serves in the determination of relative retention preference as applied *between veteran and veteran* in the same manner as tenure of employment, length of service, and efficiency ratings. But it is implicit in the interpretation adopted by this Court in *Hilton* v. *Sullivan* that none of the general

terms of the first clause may be given any effect whatever as between veteran and nonveteran, but only as between nonveteran and nonveteran and as between veteran and veteran. *Hilton* v. *Sullivan*, 334 U. S. 323, 335. Thus, as between veterans and nonveterans, the proviso-preferred sub-class of veterans' preference employees whose efficiency ratings are "good" or better is in similar fashion withdrawn and excepted from the operative effect of any higher efficiency ratings possessed by a nonveteran nonpreference employee.

It boils down to this: So long as the efficiency ratings of a veterans' preference employee in a civilian position are "good" or better—that specified efficiency rating is the only condition prescribed by Congress for the absolute retention preference right of that veteran to be retained in that position "in preference to all other competing employees" (proviso of §12, *supra*).

Who are "All other competing employees"?

There is nothing esoteric about this phrase or about any of the words in it.

Under elementary principles the intention of the Congress is to be sought primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture, *Thompson* v. *United States*, 280 U. S. 420, 442. The words used by Congress in a statute are presumed to be used in their natural import and usual and most ordinary sense, and with the meaning commonly attributed to them: *Caminetti* v. *United States*, 242 U. S. 470, 485; *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 409-410.

"*All other competing employees*" thus means all competing employees *other* than preference employees, *United States* v. *Mescall*, 215 U. S. 26, 31-32. This meaning is unnecessarily corroborated by the correlative use of the words

"competing nonpreference employees" in the next ensuing sentence of the second proviso of Section 12.

According to *Black's Law Dictionary*, 3d Ed.: "*Compete.* To contend emulously, to strive for the position for which another is striving." Citing a decision involving civil service positions. *People* v. *Chew*, 67 Colo. 394, 179 P. 812, 813.

"Competing", in its natural import and usual and most ordinary sense according to *Webster*, means "seeking or striving for the same thing, position or reward for which another is striving", to-wit, as here the position of Attorney, Grade P-3, occupied by each of the petitioners and in which each has been supplanted by other employees "competing" for the position they are striving to regain.

Bearing in mind the word "*other*" in this connection, any employee who is not a veterans' preference employee, and who is serving as an Attorney, Grade P-3, or who is ready and willing to be appointed to or serve in such position, falls within the natural meaning of "competing" for the position against these petitioners. *People* v. *Chew, supra.*

As above indicated, the Civil Service Commission was wholly without authority to give any effect to tenure of employment in any situation involving the absolute right to be retained given to a veterans' preference employee whose efficiency ratings are "good" or better. *A fortiori*, the Commission was without authority to evade the Congressional mandate by injecting any phase of *tenure of employment* into the natural import and most ordinary sense of the words "all other competing employees" used by Congress in the proviso. When the Commission did so here, it modified, altered, and changed in a radical fashion the meaning commonly attributed to these words. As stated by this Court:

> "The limits of the power to make regulations are well settled. (cit. cases) They may not extend a statute or modify its provisions." *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610.

Counsel for the Secretary argue (Mem. 5) that: "This 'contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion' is entitled to great weight." Citing *United States* v. *American Trucking Associations*, 310 U. S. 534, 549.

But as said by the Court in *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, 742:

> "Of course, this Court is not bound by administrative mistakes."

The inceptive attention and weight to be given to contemporaneous construction of a statute by administrative officers charged with its execution is a rule of interpretation, but it is by no means an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. However long continued by successive officers, such administrative construction must yield to the positive language of the statutes. *Houghton* v. *Payne*, 194 U. S. 88, 100; *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S., 315, 330, 331; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Swendig* v. *Washington Water Power Co.*, 265 U. S. 322, 331; *Louisville & Nashville R. Co.* v. *United States*, 282 U. S. 740, 757, 759; *Texas & Pacific R. Co.* v. *United States*, 289 U. S. 627, 640; *United States* v. *Tanner*, 147 U. S. 661. See, also, *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, *supra*, 297 U. S. 129, 143; and other cases cited *supra*.

If the language is plain and the meaning clear, the duty of interpretation does not arise and the sole function of the courts is to enforce the statute according to its terms. *Caminetti* v. *United States*, 242 U. S. 470, 485; *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 409; *Dewey* v. *United States*, 178 U. S. 510, 520, 521; *Houghton* v. *Payne*, *supra*.

Under the positive language of Section 12, viewed in its significant relation with Sections 2 and 18 of the Veterans'

Preference Act of 1944 and the provisions of earlier statutes embodied in the Act of 1944 [See pp. 9-12, Petition in No. 474] the respondent Secretary was required to retain these petitioner veterans in their positions as Attorneys, Grade P-3; and the Secretary's admitted failure so to do violated petitioners' legal rights under these applicable statutes.

In *Hilton* v. *Sullivan*, 334 U. S. 323, 337, the Court's footnote 10 points out that the assignment of employees of classified (permanent) tenure to the "higliest retention status" under Group A and the assignment of employees of limited tenures to lower retention status, as under Group B, was "regardless of veterans' preference and of efficiency ratings." In the Hilton case all the employees involved were of classified tenure of employment and only the question of giving effect to "length of service" was presented. Nevertheless, the Court's footnote 10 is indicative of its awareness of the disregard and violation inherent in both the 1943 and 1947 regulations of the Civil Service Commission insofar as they affect the retention preference rights of veterans of limited tenures.

The 8 days notice of exclusion was a nullity.

Did the eight days' notice given petitioners May 29, 1947, of their exclusion from duty from and after June 6, 1947 (R. 6, 51-52, 78-80) violate their rights under Section 14 of the Act of 1944?[1]

If so, such notice operated to create a rule out of harmony with the statute and was a mere nullity—void *ab initio*. *Manhattan General Equipment Co.* v. *Commission of Internal Revenue*, 297 U. S. 129, 143, and other cases cited *supra*.

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[1] "SEC. 14. No permanent or indefinite preference eligible who has completed a probationary or trial period * * * shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, * * * except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days advance notice * * * for any such proposed action; * * *" (58 Stat. 387)

Petitioners are entitled to classified competitive status.

Counsel for the Secretary argue that petitioners are only "temporary employees" (Mem. 6). This assumption of petitioner's tenure of employment is not borne out by the record (R. 15-17, 55-57, 36). According to the Secretary's averments, each of the petitioners is serving under a "*War Service Indefinite Appointment*" * * * for the duration of the present war and for six months thereafter" (R. 36). It is alleged in petitioners' Amended Complaint (R. 15-16):

> (e) That plaintiff [petitioners] received and was entitled to receive a probational appointment through said open competitive examination and under such appointment was placed on active duty on or about August 1, 1943, * * *
>
> (f) That said appointment was stated to be limited to the duration of the war and six months thereafter, but it was not limited to one year or less nor for any period that can be accurately described as other than indefinite, since the war is still officially in esse and may well continue indefinitely, even beyond the reasonable hope of lifetime of both plaintiff and formal defendant in this suit, before being declared officially at an end, and plaintiff has already served for four years less two months under such appointment; that such appointment does not come within the definition of a "temporary appointment" (Section 2.114, Civil Service Rule II, published May 1, 1947, at page 2834, Volume 12, Number 86 of the Federal Register), and accordingly such appointment is mandatorily a probational appointment pursuant to Section 2.113, Civil Service Rule II, published May 1, 1947, at page 2834, Volume 12, Number 86 of the Federal Register, which provides: "Probational appointment. (a) A person selected for other than temporary appointment shall be given a probational appointment. The first year of service under this appointment shall be a probationary period . . ."
>
> (g) That plaintiff successfully completed said probationary period of one year and was officially notified

of his completion thereof, and has satisfactorily served three years less two months in addition thereto; * * * (R. 15-16)

The question whether Attorneys, such as petitioners, are entitled to classified (competitive) civil service status is of importance to lawyers, the public, and the Government (p. 4, Petition in No. 474).

1. Are Attorney positions excepted from competitive status by the new Civil Service Rules effective May 1, 1947?[2] . . . If so——

(a) The petitioners, as veterans' preference employees whose efficiency ratings are "good" or better, are entitled *under such rules* to be retained in preference to the eight nonveteran nonpreference Attorneys, Grade P-3, thus shown to be erroneously designated and erroneously retained by respondent as

"(1) Without veteran preference. (2) Serving under an appointment with the equivalent of permanent *competitive status* in the *classified* civil service." (R. 48, 51) [Emphasis supplied.]

(b) Being excepted from such competitive status in the classified civil service, Attorneys in such positions could not be classified in any superior retention subgroup A-2 as of such competitive status or tenure of employment under the regulations for reduction in force.

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[2] §6.4 *Lists of positions excepted from the competitive service*—(a) *Schedule A.* The following positions are those excepted from the competitive service * *
(ii) Cooks * *
(iv) Attorneys.
(v) Chinese, Japanese, and Hindu interpreters. * * (12 F. R. 2837, §6.4.)
§1.1 *Positions and employees affected by these Rules.* (a) These rules shall apply to all positions in the competitive service. * * The competitive service shall include all civilian positions in the executive branch of the Government unless specifically excepted therefrom. * *
(b) Persons occupying such positions shall be considered as being in the competitive service when they have a competitive status. * * A competitive status shall be acquired by probational appointment through competitive examination, or may be granted by statute, Executive order, or the Civil Service Rules. (12 F. R. 2831, §1.1)

2. If any Attorneys are entitled to classified competitive civil service status, are petitioners so entitled?

Applicable facts.

Each of the petitioners was one of 14,000 lawyers who took and one of 2,000 who passed the written and oral competitive examination given by the Board of Legal Examiners in September, 1942, and January, 1943 (R. 15, 55-56, 3).

As a result of such competitive examination each was one of 2,000 placed on the Civil Service Commission register of Attorney eligibles (R. 55-57, 66, 15).

Each was certified for probational appointment as such Attorney eligible by the publication of this register pursuant to Sec. 17.8 *Register of eligibles.* of the Regulations of the Board of Legal Examiners, adopted January 30, 1943. (R. 56-57, 15) [Sec. 17.8 is set out in full in Appendix.]

Each was appointed from this register pursuant to Sec. 17.8, *supra*, to an Attorney position in the classified civil service, responsive to the competitive examination (R. 56-57, 15-18, 3).

Each served satisfactorily on active duty from August 1, to June 6, 1947, in an Attorney position which by express authorization of the Ramspeck Act, was covered into the classified civil service by Executive Order No. 8743 of April 23, 1941, and so remained in the classified civil service until excepted therefrom May 1, 1947 (R. 3, 50, 57).

Each satisfactorily completed his probationary period of one year in such Attorney position in the classified civil service and was officially notified in August, 1944, of his satisfactory completion thereof (R. 16, 50, 3).

Nevertheless the Secretary insists that petitioners were not and are not entitled to probational appointment and

classified (competitive) civil service status; and the courts below so held (R. 89, 90). The Court of Appeals held (R. 90) that petitioners' status or tenure was governed by paragraph (g) (5 Code Regs. §17.1 Cum. Supp. 1943) of the "*regulations of the Board of Legal Examiners*", which the Court of Appeals said was the regulation in effect at the time petitioners were appointed [August 1, 1943] and that: "It follows that throughout the period of his [petitioners'] employment he was a war service appointee with tenure limited to the duration of the war and a period of six months thereafter" (R. 90-91). The Court of Appeals also said (R. 90) that the appointment of attorneys subsequent to March 16, 1942 was governed by said regulation. The following is the regulation adopted on March 16, 1942.

Section 17.2 *Procedure prior to the establishment of registers* of the *Regulations of the Board of Legal Examiners*, adopted *March 16, 1942* (7 Federal Register, p. 2201), provides in pertinent part as follows:

> "SEC. 17. *Procedure prior to the establishment of registers* (a) * * * (g) All appointments to attorney and law clerk trainee positions shall be for the duration of the present war and for six months thereafter, unless otherwise specifically limited to a shorter period, and shall be made subject to the satisfactory completion of a trial period of one year. Such appointments shall be effected under Executive Order 9063 of February 16, 1942, and persons thus appointed will not thereby acquire a classified Civil Service status."

The Secretary avers (R. 36) that this regulation was "adopted and applied by the Legal Examining Section when it took over the functions of the Board of Legal Examiners as of July 1, 1943."

No authority, competent or otherwise, has been adduced, nor does any appear, for the Legal Examining Section to adopt or amend or determine such regulation or regulations, or for the *Legal Examining Section* to take over the

functions of the Board of Legal Examiners. Prior to July 1, 1943, the only authority to make or amend the *Regulations of the Board of Legal Examiners* appears to be provided by Executive Order No. 8743 of April 23, 1941, set out in the Appendix.

The *Board of Legal Examiners* created and empowered by EO 8743 is seen to be a responsible and autonomous body obligated to *consult* with the Civil Service Commission in respect of such regulations, etc., but in no way bound by any advice or orders of the Commission in any part of its duties. The Commission was not given any authority by the President with respect to such regulations.

The Commission recognized this situation and expressly excepted and disqualified its own *War Service Regulations* from any application in connection with Attorney positions, when it adopted the following provision.

Section 18.11 of the *War Service Regulations* (2 CFR, Cum. Supp. p. 1463) adopted March 16, 1942, by the Civil Service Commission provides in pertinent part as follows:

> "SEC. 18.11 *Extent of regulations.*—(a) * * * (b) *Regulations of Board of Legal Examiners.*—Nothing in these regulations shall be construed to affect any existing or future regulations promulgated by the Board of Legal Examiners pursuant to Executive Order No. 8743 of April 23, 1941."

It is further to be observed that the *War Service Regulations* were adopted by the Civil Service Commission pursuant to the authority of Executive Order No. 9063 of February 16, 1942, which expressly authorized the Civil Service Commission alone "to adopt and prescribe such special procedures as it may determine to be necessary" in such wartime emergency. The *Board of Legal Examiners* itself had no authority to adopt and prescribe any such special procedures under Executive Order No. 9063 as it erroneously presumed to assert in adopting and prescribing Sec. 17.2 *Procedure prior to the establishment of registers, su-*

pra. It had only the specific authority to determine regulations and procedures in such manner as to effectuate the competitive purposes contemplated and provided for in Executive Order No. 8743 pursuant to the Ramspeck Act. On the other hand, the Board of Legal Examiners was engaged in the performance of its legitimate and authorized functions when it adopted and prescribed Part 17—*Regulations of the Board of Legal Examiners*, adopted January 30, 1943 (8 F. R. 2141), pursuant to which petitioners were certified for probational appointment, appointed, and acquired classified (competitive) civil service status under the authority of the Ramspeck Act of 1940 and the Civil Service Act of 1883 (R. 55-57).

The statutes, Executive orders, regulations, and other functional material in this behalf are set out in chronological order in the Appendix to this Memorandum.

The attention of the Court is invited to the following significant points:

I. The Board of Legal Examiners was without authority to determine, adopt, or prescribe any special procedures or regulations under Executive Order 9063 or to provide that any "appointments shall be effected under Executive Order 9063", all of which the Board of Legal Examiners erroneously assumed to do when it promulgated Sec. 17.2 *Procedure prior to the establishment of registers, supra*, on March 16, 1942. The said Sec. 17.2 was therefore a nullity.

II. The Board of Legal Examiners was likewise without authority in assuming to repromulgate, adopt, or prescribe the above Sec. 17.2(g) as Sec. 17.1(g) of the Regulations of the Board of Legal Examiners which the Board promulgated April 23, 1943, in the form of a connected code of previously adopted regulations wherein it used the same text and terms of the former Sec. 17.2(g), but omitted therefrom the subhead caption "*Procedure prior to the establishment of registers*" and promulgated Sec. 17.1(g) without this or any other subhead. As more clearly shown

under the following points, the Board of Legal Examiners was equally without authority to adopt or prescribe either Sec. 17.2(g) or Sec. 17.1(g). Each and both of such regulations was thus a nullity and furnished no authority for the Secretary's limitation of the petitioners' probational appointments to "War Service Indefinite Appointments" as he erroneously assumed to do under the said Sec. 17.1(g) of the Regulations of the Board of Legal Examiners (R.36).

III. By the express terms of Executive Order 9063 it is provided:

> "1. The United States Civil Service Commission [alone] is authorized to adopt and prescribe such special procedures as it [alone] may determine to be necessary * * * for all departments * * *".

IV. By Sec. 18.11 of the *War Service Regulations* adopted by the Civil Service Commission on March 16, 1943, expressly pursuant to E O 9063, *supra*, the Commission prescribed that:

> "SEC. 18.11 *Extent of regulations.*—(a) * * * (b) Nothing in these regulations shall be construed to affect any existing or future regulations promulgated by the Board of Legal Examiners pursuant to Executive Order No. 8743 of April 23, 1941."

This War Service Regulation Sec. 18.11 was still in effect until 1946—long after August, 1944, when petitioners were officially notified of their satisfactory completion of their probationary year of service, whereupon classified (competitive) civil service status inured to each of them as a matter of law (R. 15-16, 55-57).

V. By Executive Order No. 9063 it is also expressly provided:

> "2. Persons appointed *solely* by reason of any special procedures adopted under authority of this order to positions subject to the Civil Service Act and Rules shall not thereby acquire a classified (competitive)

civil-service status, but, in the discretion of the Civil Service Commission, may be retained for the duration of the war and for six months thereafter." [Emphasis supplied]

(a) Petitioners were not appointed *solely*, or at all, by reason of the *War Service Regulations*, for the reason that in Sec. 18.11 thereof, *supra*, the Civil Service Commission explicitly withdrew the *War Service Regulations* from any application to matters connected with the province of the *Board of Legal Examiners*, i. e., recruitment and appointments to Attorney positions and in the classified civil service and matters related thereto.

(b) Sec. 17.2(g) and Sec. 17.1(g), which in terms purported to authorize employing agencies to make appointments limited to the duration of the war and six months thereafter, were unauthorized and a nullity because such appointments were by Executive Order 9063 required to be effected "*solely* by reason of . . . special procedures adopted under authority of this order", E O 9063, and in addition the Civil Service Commission itself alone was expressly designated and "authorized to adopt such special procedures" under E O 9063.

(c) Since the President in E O 9063 deemed it advisable and saw fit explicitly to restrict to the *Civil Service Commission*, itself and alone, the authority to adopt and prescribe special procedures, which would confer authority on employing agencies authority to limit appointments, made *solely* by reason of such special procedures, to the duration of the war and six months thereafter, it is not to be presumed that the President intended to clothe any other Commission, officer, or Board such as the autonomous Board of Legal Examiners, with such comprehensive authority to adopt special procedures which would in turn authorize employing agencies to limit probational appointments in the classified civil service to the duration of the war and six months thereafter.

(d) If the Board of Legal Examiners assumed to adopt Sec. 17.2(g) or Sec. 17.1(g) of its regulations partly under E O 8743 and partly under E O 9063, this would not comply with the President's requirement in E O 9063 that only appointments effected *solely* by reason of such special procedures adopted by the Commission under authority of E O 9063 may, in the discretion of the Commission, be limited to the duration of the war and six months thereafter. Sec. 17.2(g) and Sec. 17.1(g) are not thus to be salvaged from nullity.

(e) The function of effecting limited appointments to Attorney positions in the classified civil service is foreign to and in contravention of the essential purpose and policy of the Ramspeck Act and Executive Order No. 8743, which contemplate and authorize in a very particular sense procedures designed to qualify competitive applicants for probational appointment and classified (competitive) civil service status, on a par with the status enjoyed by other Federal employees.

VI. Executive Order No. 9358 of July 1, 1943, provided that: "Subject to the provisions of this order, Executive Order No. 8743 as amended shall remain in effect." EO 9358 also provided that "until further order the administration of the civil service laws in their application to attorney positions in the classified civil service and to the incumbents of such positions shall vest in the Civil Service Commission. The Commission shall have authority to determine the regulations and procedures governing the recruitment and examination of applicants for attorney positions and the selection, appointment, promotion, and transfer of attorneys in the classified civil service * *"

(a) It does not appear in the Federal Register or elsewhere that the Civil Service Commission ever adopted any special procedures or regulations with respect to Attorneys or Attorney positions at any time between September,

1942, and August, 1944, when petitioners presumably acquired competitive status. Nor does it anywhere appear that the Commission officially adopted the Regulations of the Board of Legal Examiners or officially prescribed any authority for the utilization of such regulations as regulations of the Commission or otherwise.

(b) It vaguely appears from the averments on behalf of the Secretary that an obscure subdivision, unknown to the Federal Register, or any duly adopted regulation, i. e., a "Legal Examining Section" of the Commission, assumed to act under the above Sec. 17.1(g) of the Regulations of the Board of Legal Examiners and assumed to "authorize" the Office of the Solicitor of the Secretary of Agriculture to appoint each of these petitioners to a * * *

> "War Service Indefinite Appointment pursuant to section 7, Regulation 1 of the Regulations of the Board of Legal Examiners, which regulations were adopted and applied by the Legal Examining Section when it took over the functions of the Board of Legal Examiners as of July, 1943" (R. 36)

Surely, in a Government of laws, subordinate and personnel clerks of a subdivision of the Civil Service Commission and of an executive Department, assuming to perform official acts under regulations shown to be devoid of appropriate authorization, cannot successfully clothe their unauthorized administrative acts with such *de facto* validity as to set at naught the long considered purpose and carefully determined policy which minds of distinction have sought to effectuate for their professional younger brethren through the Ramspeck Act of 1940 and the Civil Service Act of 1883.

The statutes, Executive orders, regulations, and other functional material relevant to the matter of competitive status are set out in the Appendix hereto. Such functional material serves to disclose the competitive purpose and effect of the action of Congress and the Executive in the

years before September, 1942, when the competitive examination of these petitioners and 14,000 others was held, before January 30, 1943, when Sec. 17.8 *Register of* [Attorney] *eligibles* was adopted, extending into February, 1943, when petitioners were placed on the register of Attorney eligibles and thereby certified for probational appointment to Attorney positions in the classified civil service (R. 55-57). These considerations leave open no other conclusion than that the Congressional and Executive intention and applicable authority required probational appointment of petitioners to these Attorney positions in the classified civil service, and that respondent was without authority to impose a war service limitation or any other limitation upon such probational appointment. Such intention and authority required that, immediately upon official notification of the satisfactory completion of their probationary year of service in such positions in the classified civil service, classified (competitive) civil service status should forthwith inure to each of the petitioners as a matter of law.

Under the circumstances the Secretary was in error in attempting to limit the petitioners' probational appointments to "War Service Indefinite Appointments" (R. 36) pursuant to inapplicable and/or unauthorized regulations and procedures; and his action in that connection was consequently unauthorized and a nullity. The grounds upon which the respondent acted were not those upon which his action can be sustained and an order cannot be sustained if an agency has misconstrued the law. *Securities & Exchange Commission* v. *Chenery*, 318 U. S. 80, 94-95.

(A) Petitioners were entitled to probational appointment in Attorney positions in the classified civil service by reason of the competitive examinations and procedures duly authorized and given effect under the Civil Service Act of 1883, the Ramspeck Act of 1940, Executive Order No. 8743 of April 23, 1941, and Sec. 17.8 of January 30, 1945.

(B) The attempted limitation of petitioners' probational appointments to War Service Indefinite appointments by

the Secretary of Agriculture was unauthorized and void, since the regulation [Sec. 17.1 (g)] under which the Secretary assumed to act was an unauthorized nullity and furnished no grounds upon which his action can be sustained.

(C) After such probational appointment of petitioners and upon the Secretary's official notification to petitioners in August, 1944, of their satisfactory completion of their probationary year in Attorney positions in the classified service, classified (competitive) civil service status inured to them as a matter of law.

CONCLUSION.

The judgment of the Court of Appeals, insofar as it reverses the judgments of the District Court, is correct. The petition of the Secretary of Agriculture for certiorari in No. 473 should therefore be denied.

In certain other respects, above indicated, the judgment of the Court of Appeals is in error and withholds greater and more substantial relief to which these petitioners are shown to be entitled. The public interest will be promoted by settlement in this Court of the important questions involved. The veterans' petition for certiorari in No. 474 should therefore be granted.

Respectfully submitted,

C. L. DAWSON,
ROBERT D. ELDER,
GREENE CHANDLER FURMAN,
Attorneys for Petitioners.

February, 1951.

APPENDIX TO MEMORANDUM.

The Civil Service Act of January 16, 1883, c. 27, 22 Stat. 403 et seq., 5 U. S. C. § 632 et seq., provides in pertinent part as follows:

SEC. 7. No officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the classes of employees existing on January 16, 1883, or that may thereafter exist, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith. Nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by * * *

* * * * * * * * * *

SEC. 2. * * *

Second. Among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

First. For open, competitive examinations for testing the fitness of applicants for the public service classified on January 16, 1883, or thereafter, or to be classified hereunder. Such examinations shall be practical in their character, and so far as may be shall relate to those matters which shall fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed.

* * * * * * * * * *

Fourth. There shall be a period of probation before any absolute appointment or employment aforesaid.

Section 1 of the (Ramspeck) Act of November 26, 1940, c. 919, Title I, § 1, 54 Stat. 1211, 5 U. S. C. § 631a, provides in pertinent part as follows:

SEC. 1. Notwithstanding any provisions of law to the contrary, the President is authorized by Executive order to cover into the classified civil service any offices or positions in or under an executive department, independent establishment, or other agency of the Government. * * *

Executive Order No. 8743 of April 23, 1941, *Extending the Classified Civil Service* (1 CFR, Cum. Supp., pp. 927-929) provides in pertinent part as follows:

By virtue of the authority vested in me by section 1 of the act of November 26, 1940, entitled "Extending the Classified Executive Civil Service of the United States" (54 Stat. 1211), by the Civil Service Act (22 Stat. 403), and by Section 1753 of the Revised Statutes of the United States, it is hereby ordered as follows:

Section 1. All Offices and positions in the executive civil service of the United States except (1) those that are temporary, (2) those expressly excepted from the provisions of the said act of November 26, 1940, (3) those excepted from the classified service under Schedules A and B of the Civil Service Rules, and (4) those which now have a classified status, are hereby covered into the classified civil service of the Government.

SEC. 2. * * *

SEC. 3. (a) Upon consideration of the report of the Committee on Civil Service Improvement (House Document No. 118, 77th Congress) * * * it is hereby found and determined that the regulations and procedures hereinafter prescribed in this section with respect to attorney positions in the classified civil service are required by the conditions of good administration.

(b) There is hereby created in the Civil Service Commission (hereinafter referred to a the Commission) a board to be known as the Board of Legal Examiners (hereinafter referred to as the Board). The Board shall consist of the Solicitor General of the United States and * * *

(c) It shall be the duty of the Board to promote the development of a merit system for the recruitment, selection, appointment, promotion, and transfer of attorneys in the classified civil service in accordance with the general procedures outlined in Plan A of the report of the Committee on Civil Service Improvement appointed by Executive Order No. 8044 of January 31, 1939.

(d) The Board, in consultation with the Civil Service Commission, shall determine the regulations and proce-

dures under this section governing the recruitment and examination of applicants for attorney positions, and the selection, appointment, promotion, and transfer of attorneys in the classified service.

(e) The Commission shall in the manner determined by the Board establish a register or registers of eligibles from which attorney positions in the classified service shall be filled: *Provided*, That any register so established shall not be in effect for a period longer than one year from the date of its establishment. Upon request of the Board, the Commission shall designate appropriate regions or localities and appoint regional or local boards of examiners composed of three persons approved by the Board, within or without the Federal service, to interview and examine such applicants as the Board may recommend.

(f) The number of names to be placed upon any register of eligibles for attorney positions shall be limited to the number recommended by the Board; and such registers shall not be ranked according to the ratings received by the eligibles, except that persons entitled to veterans' preference as defined in section 1 of Civil Service Rule VI shall be appropriately designated therein.

(g) * * *

(h) * * *

(i) Any position affected by this section which is vacant after June 30, 1941, may be filled before available registers have been established pursuant to this section only by the appointment of a person who has passed a non-competitive examination prescribed by the Commission with the approval of the Board, and such person after the expiration of six months from the date of his appointment shall be eligible for classified civil-service status upon compliance with the provisions of section 6 of Civil Service Rule II, other than those provisions relating to examination.

(j) The incumbent of any attorney position covered into the classified service by section 1 of this order may acquire a classified civil-service status in accordance with the provisions of section 6 of Civil Service Rule II: *Provided*, That the non-competitive examination required thereunder shall be prescribed by the Commission with the approval of the Board.

(k) * * * .

(l) The Civil Service rules are hereby amended to the extent necessary to give effect to the provisions of this section.

Part 17—*Regulations of the Board of Legal Examiners*, adopted January 30, 1943 (8 Federal Register, p. 2141) provides as follows:

Registers; rights of eligibles who enter military service. Sections 17.8 *Registers of eligibles* and 17.9 *Rights of eligibles who enter military service* are added as follows:

SEC. 17.8 *Registers of eligibles.* Registers of eligibles for attorney positions shall contain such numbers, be applicable to such positions, and be effective for such periods as the Board shall determine and announce. The publication of each register and the supplements thereto shall constitute the certification of the eligibles included. The register together with pertinent information concerning the eligibles which the Board will supply shall be available in full to appointing officers, who may make selections for appointment from among those included, subject to the Board's minimum experience requirements for particular grades of positions and with the exception that the Board may from time to time suspend the certification of eligibles from particular States in order to give effect to the principle that appointments shall so far as practicable be distributed among the States in proportion to population. Except as to individuals of whom the Board is advised by appointing officers in advance of publication of the register, all appointments to the positions and for the period covered by any register shall be from the register. The selections from any register shall be communicated immediately by the appointing agencies to the Board. The Board, immediately upon entering its approval of proposed appointments, will remove the names of the appointees from the register. The Board may from time to time add to a register others who have been found unavailable for appointment, and may at any time suspend or cancel the eligibility of an individual included upon a register for cause arising either before or after his original certification.

In case the life of a register is extended, the eligibles remaining on it may as a condition of continued eligibility be required to furnish supplementary statements of qualifications and experience.

SEC. 17.9 *Rights of eligibles who enter military service* (a) An applicant whose score upon a written examination confers eligibility for oral examination shall be entitled to take a qualifying oral examination or at the option of the Board to compete in a competitive oral examination in process at the time of his request, and, if recommended by the examining committee, to be included for one year among the eligibles for positions in the grade or grades for which the original written examination was given. * * *

(E. O. 8743, 6 F. R. 2117)

BY THE UNITED STATES CIVIL SERVICE COMMISSION,
H. B. MITCHELL,
President.

(SEAL)

January 30, 1943.

(F. R. Doc. 43-2582; Filed February 16, 1943; 1:41 P. M.)

Section 17.2 *Procedure prior to the establishment of registers* of the *Regulations of the Board of Legal Examiners*, adopted March 16, 1942 (7 *Federal Register*, p. 2201), provides in pertinent part as follows:

SEC. 17.2 *Procedure prior to the establishment of registers.* (a) * * * (g) All appointments to attorney and law clerk-trainee positions shall be for the duration of the present war and for six months thereafter, unless otherwise specifically limited to a shorter period, and shall be made subject to the satisfactory completion of a trial period of one year. Such appointments shall be effected under Executive Order 9063 of February 16, 1942, and persons thus appointed will not thereby require a classified Civil Service status.

Executive Order No. 9063 of February 16, 1942 (1 CFR, Cum. Supp. pp. 1091-1092) provides in pertinent part:

* * *

1. The United States Civil Service Commission is authorized to adopt and prescribe such special procedures as it may determine to be necessary in connection with the recruitment, placement, and changes of status of personnel for all departments * * *

2. Persons appointed solely by reason of any special procedures adopted under authority of this order to positions subject to the provisions of the Civil Service Act and Rules shall not thereby acquire a classified (competitive civil-service status, but, in the discretion of the Civil Service Commission, may be retained for the duration of the war and for six months thereafter.

Section 18.5 of the *War Service Regulations* (2 CFR, Cum. Supp. p. 1457) adopted March 16, 1942, by the Civil Service Commission, provides in pertinent part as follows:

SEC. 18.5 *Appointment*—(a) * * * (b) *Status of appointees.* Persons appointed under these regulations will not thereby acquire a classified (competitive) civil-service status. Unless otherwise specifically limited such appointments may be for the duration of the present war and for six months thereafter.

Section 18.11 of the *War Service Regulations* (2 CFR, Cum. Supp. p. 1463) adopted March 16, 1942, by the Civil Service Commission, provides in pertinent part as follows:

SEC. 18.11 *Extent of regulations.*—(a) * * *. (b) *Regulations of Board of Legal Examiners.*—Nothing in these regulations shall be construed to affect any existing or future regulations promulgated by the Board of Legal Examiners pursuant to Executive Order No. 8743 of April 23, 1941.

Pertinent excerpts from the Report of the *Committee on Civil Service Improvement*, appointed by the President in Executive Order No. 8044 of January 31, 1939 (1 Cum.

Supp. pp. 456-457) and published as *House Document No. 118, 77th Congress,* are for convenience set out as follows:

(p. 1) 1. We recommend that all positions in the professional, scientific, and higher administrative services which are designated in Sections 1 (e) and 2 (a) of Executive Order 8044, with such exceptions as may be approved by the Civil Service Commission, be placed under the provisions of the Civil Service Act by Executive order; and by consequence under the Retirement Act of 1920, as amended.

2. We recommend that the President include in the competitive classified service all other professional, scientific, and higher administrative positions (as defined by Executive Order 8044), formerly exempt by statute but which may now be included in the classified service by executive order under the act of November 26, 1940 * * *

(p. 2) 7. With respect to attorney positions, we recommend that the President by Executive order extend the Civil Service Act to those attorney positions which were affected by Executive Order 8044 and to those included within the authority granted him under the act of November 26, 1940, with such exceptions as the Civil Service Commission may approve.

However, two plans of procedure with respect to the induction of attorneys into the Government service are proposed, Plan A and Plan B. The plans differ on two points, as indicated below. Plan A recommends an unranked register of eligible candidates for attorney positions; rejects as unsatisfactory the present civil service system; asserts that attorney positions present a unique problem in the professional service which must be solved individually rather than by application of a general formula. It points out that written examinations are not trustworthy guides to capacity for many of the tasks to be performed; that present certification procedure makes it extremely difficult for the candidate to exercise any choice as to the department or agency in which he will work; and finally that until the Civil Service Commission is better acquainted with the attorney problem through practical experience the entrance into the merit system should not be confused with civil-service procedures thought to be inadequate to the attorney problem.

(p. 15) * * * attorneys are the principal class of employees affected by Executive Order 8044. * * * Two separate civil-service systems are unthinkable. * * *

(p. 29) The attorney positions total well over half of the positions withheld from the classified civil service by Executive Order No. 8044 (table VI, supra, p. 33).

The Committee is in entire accord as to the necessity that the legal positions of the Government be made a career service. * * *

(p. 31) Many recommendations from sources entitled to the greatest respect have urged a prompt inclusion of the attorney positions within the merit system. These include * * *